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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

EMILIO N. FRANCISCO,

Plaintiff and Appellant,

v.

FRANKLIN K. LANE,

Defendant and Respondent.

G043163

(Super. Ct. No. 06CC12017)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David R. Chaffee, Judge. Affirmed.

Marilyn R. Thomassen for Plaintiff and Appellant.

No appearance for Defendant and Respondent.

Emilio N. Francisco appeals from a judgment in favor of Franklin K. Lane denying Francisco equitable relief from a default judgment entered against him in another action that was entered after Francisco failed to comply with the terms of a settlement agreement. Francisco contends the trial court erred by concluding his action was barred by the statute of limitations. He also contends the evidence demonstrated the underlying judgment was obtained through fraud and should have been set aside. We find no error and affirm the judgment.

FACTS

This action is one of an untold number of lawsuits concerning residential property located on Hillsdale Drive in Newport Beach, California (hereafter the Hillsdale Property). The record on appeal is limited. Although it includes the reporter's transcript from the court trial in the current action and a second action tried at the same time, the clerk's transcript is limited. Additionally, Francisco has not provided us with any of the exhibits admitted at trial such as deeds and promissory notes pertaining to the real estate transactions at issue, or most notably, any of the pleadings in the underlying actions, or the settlement agreement and judgment he seeks to set aside.¹ From the record we do have, we have gleaned the following background facts necessary to understand the present controversy.

In 1989, Robert Ferrante desired to acquire the Hillsdale Property as his personal residence. The purchase price was \$750,000 and title was to be held by Churchill Capital Corporation, a company owned equally by Ferrante and Jules Walder. Ferrante,

¹ Francisco has not requested transmittal of exhibits. (See Cal. Rules of Court, rule 8.224(a)(1) [requires "a party wanting the reviewing court to consider any original exhibits that were admitted in evidence" to timely serve and file the proper notice in superior court designating those exhibits].) "Where exhibits are missing we will not presume they would undermine the judgment." (*Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal.App.4th 278, 291; see also *Heyman v. Franchise Mortgage Acceptance Corp.* (2003) 107 Cal.App.4th 921, 925, fn. 1 (*Heyman*).)

through Churchill, obtained a \$500,000 mortgage from Home Savings and Loan secured by a first deed of trust on the Hillsdale Property. Churchill borrowed the other \$250,000, from a company called “Hampton, Inc.,” owned by Lane, who is an attorney. The loan had been arranged by Ferrante’s friend and business associate, Ron Schmucker, who owned the escrow company handling the sale of the Hillsdale Property. Ferrante claimed he understood Schmucker owned Hampton, the money for the loan was coming from Schmucker, and he believed Lane was just Schmucker’s in-house attorney. Schmucker passed away sometime after 1989. Lane testified Ferrante knew exactly where the money was coming from. Lane told of meetings he had with Ferrante and Walder prior to Hampton making the \$250,000 loan. They assured him they only needed the money for a short while and promised to repay the money in 60 to 90 days.

Because secondary financing of the down payment was expressly prohibited by the lender on the first trust deed, the down payment loan was to be secured by a trust deed on other real property owned by Churchill, but for added security, Hampton was to be given a grant deed to the Hillsdale Property. On June 15, 1989, Walder, on behalf of Churchill, executed a \$300,000 promissory note in favor of Hampton (the \$250,000 loan plus \$50,000 interest). Walder, again on behalf of Churchill, also executed a “Corporation Grant Deed” to the Hillsdale Property in favor of Hampton, which had written on it “this conveyance is limited to a security interest only” (hereafter the 1989 Churchill/Hampton Grant Deed).

A second “Corporation Grant Deed” to the Hillsdale Property was executed by Walder on behalf of Churchill on March 1, 1991, with Churchill as the grantor and “Hamplon, Inc.” (not Hampton) as the grantee (hereafter the 1991 Churchill/Hamplon Grant Deed). Lane claimed “Hamplon” was the same company as “Hampton,” but in late 1990, he had to change the corporation’s name when a third party took the name Hampton while the corporation was suspended. The 1991 Churchill/Hamplon Grant Deed, which was recorded, contained the language, “This deed is recorded to correct the name of the grantee under deed

recorded July 24, 1989 . . . between same parties, and this deed supercedes and replaces said earlier deed in all respects . . . and represents satisfaction of all indebtedness of grantor to grantee.” Ferrante claimed the 1991 Churchill/Hamplon Grant Deed was only meant to fix the grantee’s name (i.e., from “Hampton” to “Hamplon”), and the latter verbiage was not on the deed Walder signed. Lane testified that by the time this second deed was executed, Churchill still owed him \$143,000 on the note. By 1991, the real estate market had declined significantly and Churchill had no equity in the Hillsdale Property. Lane, Ferrante, and Walder had agreed Hamplon would take title to the property in exchange for cancellation of the remaining debt. Ferrante has claimed at times that the \$300,000 debt was entirely repaid by him, in part by a \$200,00 cash payment made to Schmucker’s escrow company and by Ferrante covering Schmucker’s legal fees in a criminal prosecution against Ferrante and Schmucker. In any event, there was some agreement whereby Ferrante would remain in possession of the Hillsdale Property and cover all the expenses and maintenance.

The onslaught of litigation began soon thereafter. Who fired the first salvo is not clear, as we do not have in this record any of the pleadings, orders, or judgments from any of the prior cases. In trial testimony in the current case there were references to numerous actions brought throughout the 1990’s by Hamplon and/or Lane against Churchill and/or Ferrante. Those actions included actions on the original promissory note and to quiet title when Churchill attempted to convey a leasehold interest in the property. There were also actions brought by Churchill against Hamplon to quiet title. Lane and Hamplon obtained default judgments in several of these actions.

At some point Ferrante brought in his friend, Francisco, who was also an attorney, to act as a “straw man” to acquire title to the property from Lane. On June 1, 2001, Francisco and Lane entered into an agreement whereby Francisco could occupy the property as a tenant and had the option of buying it for \$700,000. Although an escrow was opened, Lane cancelled the escrow and Francisco quit paying rent. Lane sued Francisco in April 2002, and again in July 2002.

In 2003, Lane, not Hamplon, filed an unlawful detainer action against Francisco. Apparently, Hamplon had its corporate powers suspended in July 1992. Francisco raised Lane's lack of ownership and standing to sue as a defense. Lane produced a deed, signed by him, dated March 2, 1992, conveying the Hillsdale Property to himself (hereafter the 1992 Hamplon/Lane Grant Deed). The 1992 Hamplon/Lane Grant Deed was notarized by Tom F. Luo. It was not recorded until July 24, 2003, but it is not clear from the record if that was before or after the 2003 unlawful detainer action was filed. (At trial in the current action, Lane testified he did not record the 1992 Hamplon/Lane Grant Deed earlier so as to prevent unrelated judgment creditors from attaching the property.) A judgment was granted in Lane's favor in the 2003 unlawful detainer action, and he was awarded \$46,000 in back rent against Francisco.

More litigation concerning the Hillsdale Property ensued. In July 2004, Francisco sued Lane for specific performance and quiet title. A company called Aviatech, an assignee of Churchill's interest in the property, sued Lane and that action was dismissed. Two of those actions lead us to the case at hand.

In 2003, Lane filed an action in Orange County Superior Court referred to below as *Lane v. Hobson*, Case No. 03CC14100. The pleadings are not before us, but apparently the action was for fraud against Ferrante, Francisco, their attorneys, and others (sometimes referred to collectively as the Ferrante litigants), alleging someone had forged Lane's signature to a release of a judgment lien he had from one of his earlier actions. Roger Agajanian represented the Ferrante litigants.

In 2004, Ferrante, Churchill, Francisco, and others, represented by Agajanian, filed an action against Lane, Hampton, Hamplon, various title companies and escrow companies, and members of the "Troop" family who (apparently unwittingly) stepped into the fray when they bought the Hillsdale Property from Lane. (*Ferrante v. Lane*, Case No. 04CC09684, hereafter the 2004 fraud case.) Again, we lack the full pleading, but the complaint's caption page is in this record and it indicates the complaint contained numerous

tort and contract causes of action, including for slander of title, fraud, and malicious prosecution.

In April 2005, Judge Steven Perk held a settlement conference in *Lane v. Hobson*, Case No. 03CC14100. The parties entered into what in the current case is referred to as a global settlement of all the outstanding lawsuits and judgments, except the 2004 fraud case, Case No. 04CC09684, and the parties entered into a stipulation for judgment—again not part of the record before us. For reasons that are not clear, Debra Martinez, Ferrante’s secretary, at some point was added in as a Doe defendant and she too signed the stipulation for judgment in *Lane v. Hobson*, Case No. 03CC14100. When the Ferrante litigants failed to comply with the terms of the settlement by depositing the agreed upon \$20,000 down payment, Lane filed an ex parte application for entry of a default judgment. The Ferrante litigants were given notice of the ex parte hearing and their attorney, Agajanian, was present. The trial court entered judgment for Lane in *Lane v. Hobson*, Case No. 03CC14100, for \$275,000.

The Current Case (06CC12017)

The action before us now, *Ferrante v. Lane* (Orange County Superior Court Case No. 06CC12017) was filed on November 15, 2006, by Ferrante, Francisco, and Martinez. The action was one in equity to vacate the judgment entered in *Lane v. Hobson*, Case No. 03CC14100, based upon extrinsic fraud. The plaintiffs alleged Lane had induced the settlement agreement by fraudulently representing he owned the Hillsdale Property, and he then “intentionally sabotaged the settlement in order to obtain [j]udgments on the settlement agreements.” They alleged the deed upon which Lane claimed ownership, i.e., the 1992 Hamplon/Lane Grant Deed, was “fraudulent based upon signature and [n]otary problems[,]” and the corporation that transferred the property to Lane, i.e., Hamplon, was barred from doing so because of defects in its corporate status.

The Ferrante litigants moved to consolidate the current action, Case No. 06CC12017, with the 2004 fraud case, Case No. 04CC09684, which was still pending

trial. The court denied the motion, but deemed the two cases related and the two cases were tried simultaneously in a bench trial.

As concerns the current case, Ferrante and Francisco testified the underlying settlement in *Lane v. Hobson*, Case No. 03CC14100, was motivated by, and premised upon Lane's claim to be owner of the Hillsdale Property and the validity of the 1992 Hamplon/Lane Grant Deed. Both testified they did not suspect at the time that the deed was a forgery.

The Ferrante litigants presented testimony from a handwriting expert. The expert testified he had compared the signature of notary Luo that appeared on the 1992 Hamplon/Lane Grant Deed, with the signature of Luo appearing on photocopies of two notarized court documents filed in 2004. He was of the opinion the signatures were "probably not written by the same individual" When asked if the signature of Luo on the 1992 Hamplon/Lane Grant Deed was a forgery, the expert replied, "it could be that. I don't make determinations as to forgery. I make determinations as to authorship."

Neither the Ferrante litigants nor Lane could locate Luo at the time of trial. Lane testified he arranged for Luo, with whom he had no prior relationship, to come to his office on March 2, 1992. Lane signed the grant deed in Luo's presence, and Luo notarized the signature in Lane's presence. Lane denied that there was anything "forged or phoney or illegal about [the] deed."

Martinez, who represented herself at trial in the current action, testified she had no idea why she had even been named as a defendant in *Lane v. Hobson*, Case No. 03CC14100. Martinez testified she just did what she was told to by her boss, Ferrante, and their attorney, Agajanian, who assured her that if she signed the stipulation for settlement, it would resolve everything for her. Lane testified, in essence, he had no basis for naming Martinez in *Lane v. Hobson*, Case No. 03CC14100, but Ferrante, Francisco, and Agajanian had offered her up as a "substitute" defendant so Lane would dismiss one of the other

named defendants. (In short, as the trial judge in the current case observed, albeit in more colorful language, the lawyers threw the secretary under the bus!!).

Following a three-day bench trial, the court took the matter under submission as to both the current case, Case No. 06CC12017 and the 2004 fraud case, Case No. 04CC09684. The parties did not request a statement of decision. At a hearing on March 13, 2009, the court ruled first on the 2004 fraud case, Case No. 04CC09684. In its oral comments, the court observed Lane's ownership of the Hillsdale Property had been at issue from the very beginning in litigation that commenced in the 1990's, and thus the plaintiffs' claims were barred by the three-year statute of limitations applicable to fraud (Code Civ. Proc., § 338, subd. (d)). The court also commented that while it had "concern about the way the property transferred as between Hampton and Hamplon, and as between Churchill and Hampton" there was insufficient evidence to establish fraud committed by Lane—"and so in the end, as to the 2004 case, the court is finding in favor of [Lane] and against [the Ferrante litigants]."

The court then moved on to the current case, Case No. 06CC12017. It found in favor of Martinez, concluding she was an innocent bystander, who had been improperly induced by Ferrante and Agajanian to sign the stipulation and thus the judgment in *Lane v. Hobson*, Case No. 03CC14100 should be set aside as to her alone. As to Ferrante and Francisco, the court ruled the judgment in *Lane v. Hobson*, Case No. 03CC14100 would remain effective. The court directed Lane to prepare the judgment in the 2004 fraud case, Case No. 04CC09684, and directed trial counsel for Ferrante and Francisco, Eugene R. Salmonsens, to prepare the judgment in the current case, Case No. 06CC12017.

Apparently, it took Salmonsens four months, and a subsequent court order to show cause, to submit a judgment. When he did, he submitted a judgment that set aside the entire judgment and expunged all abstracts of judgments pertaining to *Lane v. Hobson*, Case No. 03CC14100. The court signed the judgment as submitted, but on a subsequent motion by Lane, signed an amended judgment on November 16, 2009, setting aside the judgment

and expunging abstracts of judgment in Case No. 03CC14100 as to Martinez only and confirming that as to all other parties (e.g., Ferrante and Francisco) the judgment in *Lane v. Hobson*, Case No. 03CC14100 was valid and binding.

Francisco alone appeals from the judgment in Case No. 06CC12017. There is no appeal of the judgment in the 2004 fraud case, Case No. 04CC09684.

DISCUSSION

Francisco contends the judgment denying his request for equitable relief from the judgment against him in *Lane v. Hobson*, Case No. 03CC14100, must be reversed because the court erroneously concluded the action was barred by the three-year statute of limitations applicable to fraud. Francisco also contends the uncontroverted evidence demonstrated the settlement, and hence the default judgment, in *Lane v. Hobson*, Case No. 03CC14100 was obtained through extrinsic fraud. We reject his contentions.

Francisco's statute of limitations argument is easily dismissed. The trial court did not conclude the *current case* was barred by the fraud statute of limitations. Its comments concerning the statute of limitation pertained to the 2004 fraud case, Case No. 04CC09684, tried simultaneously with the current case. That judgment is not before us on this appeal. The court offered no explanation as to why it ruled *against* Ferrante and Francisco in their equitable action to vacate the judgment in *Lane v. Hobson*, Case No. 03CC14100, it only commented on why Martinez should be granted relief and then denied relief to Ferrante and Francisco. There was no statement of decision. (Code Civ. Proc., § 632.) When a statement of decision has not been requested or issued, "the appellate court will infer the trial court made implied factual findings to support the judgment. [Citation.]" (*Fladboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 59.) With that standard in mind, we turn to Francisco's contention the evidence mandated the underlying judgment be vacated due to extrinsic fraud.

Courts have inherent, equitable power to set aside a judgment on grounds of extrinsic fraud or mistake. (*Moghaddam v. Bone* (2006) 142 Cal.App.4th 283, 290-291;

Sporn v. Home Depot USA, Inc. (2005) 126 Cal.App.4th 1294, 1300.) There are three essential requirements to obtain relief. The moving party must show: (1) a meritorious defense; (2) “a satisfactory excuse for not presenting a defense to the original action”; and (3) diligence in seeking to set aside the default as soon as it was discovered. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 982.)

Francisco contends the extrinsic fraud was that he entered into the stipulation to settle *Lane v. Hobson*, Case No. 03CC14100, based on Lane’s assertion he owned the Hillsdale Property by virtue of the 1992 Hamplon/Lane Grant Deed, which Lane executed in March 1992. Francisco asserts it is clear, however, that Lane did not execute the deed at that time because the notary’s acknowledgement on the deed was obviously forged. Francisco urges that leads to the obvious conclusion Lane prepared the deed sometime later (for example during the 2003 unlawful detainer action against Francisco when Francisco challenged Lane’s standing to sue). He argues Lane obviously backdated the deed to a date *before* Hamplon was suspended in July 1992, because Hamplon would not have been able to convey the property after that time. (See Rev. & Tax. Code, § 23302, subd. (d) [suspended corporation may not transfer real property].)

Because we are bound by the substantial evidence rule, we must reject Francisco’s contention. Francisco’s expert testified the notary’s signature on the 1992 Hamplon/Lane Grant Deed was not by the same hand that signed the notary’s signature on other court documents dated over 10 years later, but he declined to say one or the other was forged. Furthermore, a notary’s signature goes only to the recordability of a deed, not to its validity. Even without a notary signature, the deed could still operate as a valid conveyance of title. (*Williston v. City of Yuba City* (1934) 1 Cal.App.2d 166, 171.) Lane denied backdating the deed and testified he arranged for the notary to come to his office on March 2, 1992, signed the grant deed in the notary’s presence, and watched the notary sign the acknowledgment. We must assume the trial court believed Lane.

Furthermore, even granting Francisco’s speculation about the origins of the 1992 Hamplon/Lane Grant Deed is plausible, substantial evidence still supports the trial court’s conclusion extrinsic fraud was not shown so as to warrant vacating the underlying judgment in *Lane v. Hobson*, Case No. 03CC14100. ““Extrinsic fraud occurs when a party is deprived of his opportunity to present his claim or defense to the court, where he was kept in ignorance or in some other manner fraudulently prevented from fully participating in the proceeding. [Citation.] Examples of extrinsic fraud are: concealment of the existence of a community property asset, failure to give notice of the action to the other party, convincing the other party not to obtain counsel because the matter will not proceed (and it does proceed). [Citation.] Extrinsic mistake involves the excusable neglect of a party. [Citation.] When this neglect results in an unjust judgment, without a fair adversary hearing, and the basis for equitable relief is present, this is extrinsic mistake. [Citation.] Reliance on an attorney who becomes incapacitated, or incompetence of the party without appointment of a guardian ad litem, are examples of extrinsic mistake. [Citation.] [¶] Fraud is intrinsic and not a valid ground for setting aside a judgment when the party has been given notice of the action and has had an opportunity to present his case and to protect himself from any mistake or fraud of his adversary, but has unreasonably neglected to do so. [Citation.] Such a claim of fraud goes to the merits of the prior proceeding which the moving party should have guarded against at the time. *Where the defrauded party failed to take advantage of liberal discovery policies to fully investigate his or her claim, any fraud is intrinsic fraud.* [Citation.]’ [Citations.]” (*Heyman, supra*, 107 Cal.App.4th at p. 926.)

Long before *Lane v. Hobson*, Case No. 03CC14100 was resolved in 2005, Francisco knew Lane claimed ownership of the Hillsdale Property by virtue of the 1992 Hamplon/Lane Grant Deed. Lane’s ownership was raised in the 2003 unlawful detainer action against Francisco and the deed was produced at that time. Francisco was represented by counsel in *Lane v. Hobson*, Case No. 03CC14100, negotiated a settlement of the action, had notice of Lane’s motion for entry of judgment, and was represented by

counsel at that proceeding as well. There is no evidence suggesting Lane in anyway prevented Francisco from investigating or presenting any defenses he had in the action. Francisco insists that despite his knowledge of the 1992 Hamplon/Lane Grant Deed, the deed's validity was not litigated in earlier proceedings and he had no reason to suspect the deed was fraudulent. But this is not a collateral estoppel case. At issue here is whether Lane fraudulently prevented Francisco from investigating or raising the issue of the deed's validity or Lane's claim to title of the Hillsdale Property in *Lane v. Hobson*, Case No. 03CC14100 so as to prevent Francisco from having a fair hearing. Substantial evidence supports the trial court's conclusion Francisco did not establish extrinsic fraud by Lane. Accordingly, the judgment must be affirmed.

DISPOSITION

The judgment is affirmed. As there has been no appearance by Respondent, no costs are awarded.

O'LEARY, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

FYBEL, J.